No. 75-1425

In the Supreme Court of the United States

OCTOBER TERM, 1976

NORTHERN HELEX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 2-41) is reported at 524 F. 2d 707. The report of the trial judge (Pet. App. 42-298) is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on October 22, 1975. A timely petition for rehearing *en banc* was denied on January 9, 1976. The petition for a writ of certiorari was filed on April 7, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims violated its own Rule 147 by not stating separately the facts necessary to its decision in this case.

2. Whether, in this action for breach of contract for the purchase of helium, the Court of Claims erred in denying the plaintiff damages for the costs of continuing to operate its helium plant subsequent to the breach.

STATEMENT

In 1961, petitioner entered into a long-term contract for the sale of helium to the United States. In 1968, the United States fell behind in its payments to petitioner under the contract, and petitioner subsequently brought an action in the Court of Claims for breach of contract. In *Northern Helex Co.* v. *United States*, 455 F. 2d 546 (Ct. Cl.) (Pet. App. 299-315), the court held that the government's failure to pay was a material breach of the contract and referred the case to a trial judge for consideration of the question of damages. The trial judge recommended damages in the amount of the full contract price for the balance of the contract period—$80,255,000 (Pet. App. 42-298). On review, the Court of Claims reduced the award by approximately $43,000,000, the cost to petitioner of operating its helium plant subsequent to the breach (Pet. App. 2-41).

1. The question of the appropriate measure of damages arises from the integration of petitioner's helium extraction facilities with the natural gas processing facilities of petitioner's parent and sister corporations.

The facts relevant to the integration of these facilities are set forth in the opinion of the Court of Claims (Pet. App. 7-13). Petitioner, a wholly-owned subsidiary of Northern Natural Gas Company ("Northern"), was organized to construct and operate a facility for the extraction of helium and nitrogen from the natural gas produced by Northern. The extraction of these inert gases enriched the natural gas that Northern was thereby able to supply

its customers. In turn, under the contract entered into in 1961, petitioner sold the helium so extracted to the federal government.

After petitioner entered into its contract with the government, Northern made other changes in the processing of its natural gas. It caused Northern Gas Products Company ("Gas Products"), a subsidiary engaged in the removal of liquified petroleum gas ("LPG") products from Northern's natural gas, to build another extraction plant for the removal of ethane from the natural gas. These plants were interconnected with petitioner's, and Northern's natural gas now moves through Gas Products' and petitioner's extraction plants before distribution to customers. The LPG and ethane extracted by Gas Products are used in the petrochemical operations of Northern Petrochemical Company ("Petrochemical"), another subsidiary of Northern (Pet. App. 7-8).

The effect of the removal of LPG and ethane from natural gas is to reduce the heating value of the remaining gas; that heating value is restored, however, by the removal of nitrogen, which is removed in the course of extracting helium (see Pet. 4). Thus the choice faced by petitioner and its related companies at the time of the government's breach of the helium contract was (a) to cease the extraction of helium and nitrogen, which would require Northern either to forego the sale of its natural gas or to terminate the extraction of LPG and ethane and the petrochemical operations dependent thereon, or (b) to continue to extract helium and nitrogen, which would then be sold privately if possible or disposed of as waste products. Management of the related companies apparently has determined that the second choice is commercially preferable, even if the resulting helium must be released as waste. In other words, extracting helium, even without a buyer, is now more profitable to the integrated operations than not

extracting it. Accordingly, petitioner has continued the extraction of helium.

2. Petitioner throughout has taken the position that the cost of continued extraction should be treated as an injury resulting from the government's breach and therefore borne by the government. The trial judge agreed, basing his decision upon an inference from the evidence that the degree of interdependence between petitioner's facilities and those of Northern, Gas Products, and Petrochemical, and therefore the commercial desirability of continuing to operate petitioner's helium extraction plant, had been foreseeable by the government (Pet. App. 147-148).

The Court of Claims rejected the trial judge's recommendation. The court pointed out that, as a general matter, "[p]erformance costs were the sole responsibility of [petitioner] as the seller of the helium and the Government as the buyer had no liability with respect to them" (Pet. App. 10). More specifically, the court noted that the contract expressly absolved the government from any liability arising out of the integration of facilities (Pet. App. 10, 14-15). Although the court found this provision dispositive (Pet. App. 13), it explicitly rejected, as not supported by the facts, petitioner's argument that "the Government had sufficient reasons to foresee the harm that would result to [petitioner] if the Government breached or terminated the contract, and that this imposed an obligation on the Government to pay the cost of [petitioner's] performance to the end of the contract term * * * " (Pet. App. 12).

ARGUMENT

This case, while involving a large amount of money, raises no issue of general importance warranting review by this Court. Contrary to petitioner's principal contention, the Court of Claims did not violate its own

rules in deciding this case. Petitioner's remaining arguments involve the application of settled legal principles to a particular factual situation, and in any event were correctly rejected by the court below.

1. Petitioner claims (Pet. 12-26) that in deciding this case the Court of Claims violated its own Rule 147, which provides that "[i]n all actions tried on the facts, the court will find the facts and state separately its conclusion of law, and will enter an appropriate judgment," and that "the findings of fact made by the trial judge shall be presumed to be correct." The gravamen of petitioner's argument is that the court did not adequately explain the basis for its disagreement with the trial judge on the question of the foreseeability of the extent to which the operation of petitioner's helium plant would become commercially integrated with the operation of the extraction facilities of the affiliated companies.

a. Petitioner's argument on this point suffers from two fatal defects. As we demonstrate below (pp. 7-9, *infra*), it is incorrect as a matter of law. But, more fundamentally, the correctness *vel non* of petitioner's argument is irrelevant to the disposition of this case because that argument proceeds upon a misconception of the basis of the decision below: the judgment of the Court of Claims rests not upon the factual question of foreseeability but upon the specific language of the contract between petitioner and the United States.

Article 31.3 of that contract completely absolved the federal government from any liability for costs that might arise as the result of the integration of processing facilities. It provides (see Pet. App. 10):

> In connection with Seller's plant, Seller at its sole risk, cost and option may construct and operate,

> or cause to be constructed and operated, facilities for extracting products other than helium from the natural gas processed through said helium plant.

The facilities now operated by Gas Products are "facilities for extracting products other than helium from the natural gas processed through [petitioner's] helium plant," and it is as a result of the operation of those facilities, *i.e.*, the extraction of LPG and ethane from the natural gas, that petitioner now finds it preferable to continue to incur the "integrated costs" of helium extraction. Since the contract specifies that the operation of those facilities was to be at petitioner's "sole risk," petitioner is not entitled to recovery for the costs arising from such operation.

Thus the issue of foreseeability was not relevant to the determination of the case. If integrated costs were not foreseeable, petitioner could not recover for such costs even in the absence of Article 31.3. See ALI, *Restatement of the Law of Contracts*, §329, Comment *a* (1932); Pet. App. 11. On the other hand, if, as petitioner contends, such costs were foreseeable, that very foreseeability would provide ample explanation, if any were needed, why the government insisted in Article 31.3 that the operation of integrated facilities would be at petitioner's "sole risk, cost and option."

Accordingly, the Court of Claims correctly concluded (Pet. App. 14-15):

> Regardless of the pre-contract discussions and negotiations between the parties, under well settled principles of contract law, for which citation is unnecessary, all such discussions and negotiations merged into the executed contract. As has been stated, the contract does not impose any obligation on the Government to pay [petitioner's] costs of performing

> the contract to the end of the term, nor any obligation whatever to pay any costs with reference to [petitioner's] integrated operations with its parent and sister companies. As stated above, the contract absolves the Government from liability for any costs of [petitioner's] integrated operations.

b. The Court of Claims did, however, consider the question of foreseeability and determined that the specific harms alleged by petitioner to have resulted from the breach as a consequence of integration had not been foreseeable (Pet. App. 12-13). In so determining, the court did not contravene its own Rule 147. That Rule does not prescribe any particular form in which the Court of Claims' decisions must be written. Accordingly, although in some decisions that court has used a separate heading entitled "Findings of Fact,"[1] in others the court has woven its factual findings into its opinion, often with a prefatory statement, such as the one here, that "[t]he facts necessary for our decision are included in this opinion" (Pet. App. 3).[2] Petitioner's suggestion (Pet. 14) that in this case the court has departed "from its 110-year [old] procedure" is therefore plainly wrong.

Nor is the practice of not stating the facts in a separate section of the opinion a violation of Rule 147. That Rule is similar in substance to Rule 52(a), Fed. R. Civ. P., which provides that "[i]n all actions

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[1] *E.g.*, *Williams & Wilkins Co.* v. *United States*, 203 Ct. Cl. 74, 149, 487 F. 2d 1345; *Butz Engineering Corp.* v. *United States*, 204 Ct. Cl. 561, 564, 499 F. 2d 619, 620.

[2] *E.g.*, *Switkes* v. *United States*, 480 F.2d 844 (Ct. Cl); *Groves* v. *United States*, 202 Ct. Cl. 660; *Peck Iron & Metal Co.* v. *United States*, 496 F. 2d 543 (Ct. Cl.); *Carter* v. *United States*, 509 F.2d 1150 (Ct.Cl.); *KFOX, Inc.* v. *United States*, 510 F. 2d 1365 (Ct. Cl.).

tried [in the district courts] upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon* * * ." As long ago as 1946, however, the rule was amended to make clear that "[i]f an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." See Rule 52, Fed. R. Civ. P. (Notes of Advisory Committee on 1946 Amendment to Rules). Since then there has been no doubt that findings by a district court embodied in an opinion, in the manner followed by the Court of Claims here, comply with the requirement of Rule 52. *Trentman* v. *City and County of Denver, Colo.*, 236 F. 2d 951 (C.A. 10), certiorari denied, 352 U.S. 943; *Elam* v. *United States*, 250 F. 2d 582 (C.A. 6), certiorari denied, 358 U.S. 848.[3] Since that rule, requiring the facts to be "specially" found, appears to be, if anything, more demanding than Rule 147, there can be little reason to construe the Court of Claims' own rule to impose upon that court a requirement that was rejected for the district courts thirty years ago.[4]

Moreover, the factual predicate for the court's conclusion with regard to foreseeability was adequately explicated. The court did not, as petitioner claims (Pet. 11), disregard the trial judge's findings of fact.

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[3]The cases cited by petitioner (Pet. 18-19) as indicating a contrary view were all decided before the 1946 amendment.

[4]*United States* v. *Causby*, 328 U.S. 256, relied upon by petitioner (Pet. 17-18), is inapposite. When that case was decided, the Court of Claims was required, by a statute dealing with this Court's review of that court's decisions, to make separate findings of fact on material issues. See 53 Stat. 752; 328 U.S. at 267-268. That requirement was not retained when Title 28 was revised and codified in 1948. See 28 U.S.C. 1255.

Many of the facts underlying the question of foreseeability—such as the documentary evidence referred to by petitioner (Pet. 23-15)[5]—were not themselves in dispute, as petitioner acknowledges (see Pet. 22).[6] Rather, it was the inferences to be drawn from those facts that divided the Court of Claims and the trial judge, and in these circumstances it was not necessary under Rule 147(b) for the court to indicate, item by item, its agreement or disagreement with the trial judge, especially since the reasons for its contrary conclusion were manifest (see Pet. App. 12-15).[7]

In any event, the question whether the Court of Claims has, in an isolated instance, departed from the form of opinion prescribed by its rules is not such as to warrant review by this Court. Even if a failure to state facts separately from the legal analysis to which those facts relate did constitute a violation of Rule 147, as petitioner claims, it would not represent such a departure "from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." Rule 19.1(b) of the Rules of this Court.

2. a. Petitioner also contests the correctness of the court's conclusion with regard to the issue of fore-

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[5]And see Chief Judge Cowen's concurring opinion, Pet. App. 30-32.

[6]See also the Preliminary Statement in Plaintiff's Objections to Defendant's Requested Findings of Fact at 1: "The plaintiff's and defendant's requested findings of fact reflect mutual agreement on a great many factual issues. Disagreements on many of the others relate only to relevancy and conclusions."

[7]Compare Rule 52, Fed. R. Civ. P., under which, according to the Advisory Committee, the district court "need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for overelaboration of detail or particularization of facts." Notes of Advisory Committee on 1946 Amendment to the Rules.

seeability, referring to that conclusion as an "arbitrary assumption that the Government did not have sufficient reason to foresee the integration [of petitioner's helium plant with other extraction facilities]" (Pet. 27). As we have explained above (pp. 5-7, *supra*), the issue of foreseeability is a red herring; it is not pertinent to the disposition of this case. In any event, the Court of Claims' assessment of the facts is correct.

The Court of Claims did not rule that the integration of petitioner's helium plant with other extraction facilities was wholly unforeseen. Rather, the court found that the government had had no reason to foresee the degree of interrelatedness that eventually evolved and "the harm that would result to the [petitioner] if the Government breached or terminated the contract" (Pet. App. 12). This finding was not arbitrary. Gas Products' ethane plant—the centerpiece of the several companies' operations—did not become operative until 1970, some nine years after execution of the helium purchase contract. It was not until then that the extraction of nitrogen by petitioner's helium plant became critical to the quality of Northern's natural gas. At the time the helium contract was made, however, the government had had no reason to foresee that Northern's enterprise, as well as Gas Products' and Petrochemical's, would be dependent upon petitioner's continued operations (see Pet. App. 12-14, 30-37). Indeed, the government's contract price was based upon the estimated costs of building its own helium plant, not upon the costs of private helium contractors, and the government accordingly had no interest in, nor had it made any inquiry into, the details concerning and costs of Northern's future operations. These facts justified the Court of Claims' finding that the government had not foreseen the liability that petitioner now would impose upon it. Accordingly, even disregarding Article 31.3 of the contract, the costs of operating

petitioner's helium plant were properly denied as an item of damages. See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540.

b. Nor, contrary to petitioner's claim (Pet. 30-35), was it entitled to the full contract price under Sections 2-703, 2-704, and 2-709 of the Uniform Commercial Code.

Throughout this litigation petitioner's principal reliance has been upon the common law of contract, according to which, absent specific contractual terms to the contrary, foreseeability of harm is the critical inquiry (see ALI, *Restatement, supra*, §329, Comment *a*).[8] Now petitioner argues, however, that the Uniform Commercial Code should govern this case and that its provisions entitle petitioner to recover the contract price even if common law principles do not. Even putting aside Article 31.3 of the contract, which itself is dispositive of petitioner's argument, we disagree with petitioner's reading of the Code.

(1) Section 2-703 allows the seller to pursue one or more remedies without having to elect among them. Section 2-704 allows the seller, "in the exercise of reasonable commercial judgment * * * [to] complete the manufacture [of goods unfinished at the time of breach] and wholly identify the goods to the contract * * *." Section 2-709 then allows the seller to sue for the full contract price "of goods identified to the contract if * * * the circumstances reasonably indicate that" resale of the goods at a reasonable price would be impossible upon reasonable effort.

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[8] In his concurring opinion, Chief Judge Cowen accordingly observed (Pet. App. 29) that the Code "does not apply to this case; both parties agree that plaintiff's damages should be computed in accordance with common law principles, and the court has followed that course."

It seems self-evident that the helium contained in natural gas in place, itself not even owned by petitioner, is not an "unfinished good" within the meaning of Section 2-704; such helium is a raw material, not yet even extracted from the earth, and no "manufacture" has yet begun. Section 2-704 could not have been intended to permit a seller to continue the acquisition of raw materials and manufacture of finished goods for an additional twelve years after the breach. Furthermore, Section 2-709(2) expressly provides that "[w]here the seller sues for the price he must hold for the buyer any goods which have been identified to the contract * * *." Petitioner has not held the helium it has produced, but instead has vented it into the atmosphere (Pet. App. 46). Therefore, it would not in any event be entitled to the contract price under Section 2-709.

(2) As Judge Nichols (concurring in part and dissenting in part) observed (Pet. App. 37), the Code provisions "do not differ materially from [the rules] acknowledged by the court to apply at common law," *i.e.*, the Code embraces the common law principle that a seller is only entitled to damages that were foreseeable by the buyer. See *Globe Refining Co.* v. *Landa Cotton Oil Co.*, *supra*; ALI, *Restatement*, *supra*, §329, Comment *a*. Since, as the court correctly found, the facts show that the government had had no reason to foresee the extent to which petitioner's helium plant would become interrelated with the facilities of Northern, Gas Products, and Petrochemical, the costs of running the helium plant to the end of the contract period would not be chargeable as damages to the government even under the Uniform Commerical Code.[9]

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[9]In its earlier decision in this case (Pet. App. 299-315), the Court of Claims applied Section 1-207, dealing with waiver of breach, and said that petitioner had exercised "reasonable commercial judgment" in continuing performance following the breach. The inquiry there was waiver, not damages. It may have been "reasonable commercial judgment" for petitioner to continue to perform for the limited period between breach and institution of suit, but it does not follow—and the court was not deciding—that it would be equally reasonable to continue to perform for an additional 12 years. As the court in its earlier decision noted (Pet. App. 311), "[t]he Government was not hurt" by petitioner's continued performance up to that time (the helium produced had been tendered and accepted). A "material increase in damages" would result, however, by petitioner's continued performance throughout the remainder of the contract period, making such a course unreasonable under Section 2-704. See the official Comment to that provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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